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SUPREME COURT, U.S.

80-6369
Case No.

In The

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

ORIGINAL COPY

ANTHONY RAY PEEK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

WHETHER PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER, SEXUAL BATTERY, GRAND LARCENY, AND BURGLARY VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE STATE'S EVIDENCE FAILED TO PROVE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT?

II

WHETHER THE DEATH SENTENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT RELIED UPON NONSTATUTORY AND IMPROPER AGGRAVATING CIRCUMSTANCES, AND THE SUPREME COURT OF FLORIDA FAILED TO INSURE CONSISTENCY IN THE ADMINISTRATION OF THE DEATH PENALTY?

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OPINION BELOW

The opinion of the Supreme Court of Florida is as of yet unreported but appears in Appendix A of the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Respondent does not question the jurisdictional statement as stated in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

REASONS FOR DENYING CERTIORARI

QUESTION I

WHETHER PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER, SEXUAL BATTERY, GRAND LARCENY, AND BURGLARY VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECUASE THE STATE'S EVIDENCE FAILED TO PROVE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT.

The question presents no significant constitutional question for the Court to consider. That the Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt is not disputed. In Re Winship, 397 U.S. 358 (1970). That is precisely the standard followed by the Florida Supreme Court in the instant case ("A" A-4).

Petitioner may not agree that the evidence sufficed beyond a reasonable doubt, but his opinion which he now asks the Court to accept varies with the opinion of a twelve person jury, a trial judge and five justices of the Supreme Court of Florida. Should the Court grant the writ it would not decide any

unsettled federal question nor set out any new standard to follow in criminal jurisprudence. What petitioner asks is for the Court to review the entire trial record and determine whether the evidence suffices under that standard. Hardly a matter that should be considered by the Court.

Petitioner argues that the decision of the Supreme Court of Florida conflicts with Jackson v. Virginia, 443 U.S. 307 (1979). It does not. The question in that case was what the standard was to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in state court upon insufficient evidence. This case has not been through federal habeas proceedings. If and when it does we feel confident that the federal court that hears the matter will follow the standard enunciated by the Court in Jackson v. Virginia.

QUESTION II

WHETHER THE DEATH SENTENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT RELIED UPON NONSTATUTORY AND IMPROPER AGGRAVATING CIRCUMSTANCES, AND THE SUPREME COURT OF FLORIDA FAILED TO INSURE CONSISTENCY IN THE ADMINISTRATION OF THE DEATH PENALTY.

The primary problem with the question as presented by petitioner is that it incorrectly assumes that reliance was had on nonstatutory or improper aggravating circumstances in upholding the sentence of death. This is incorrect. The Supreme Court of Florida found that two of the aggravating circumstances which were found by the trial judge to exist were improperly considered because the facts supporting them did not fall within the legislative intent as to what constituted those two aggravating circumstances. The two were: (a) that the offense

was committed for pecuniary gain and (b) that petitioner was under a sentence of imprisonment at the time that petitioner committed the instant offense. As to (a) above the court held that although the victim's purse was ransacked and automobile taken, there was no evidence to establish petitioner intended to profit from his crime. As to (b) the court held that one on probationary status is not under a sentence of imprisonment.

After striking these two aggravating circumstances from the equation the Florida Supreme Court determined that the sentence was proper because there remained three aggravating circumstances, which outweighed the mitigating since there were none.

Petitioner suggests that the procedure violates the cruel and unusual punishment clause of the Eighth Amendment, but fails to explain how it is so unstructured as to create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.

The fact is that Florida's procedure is sufficiently structured, Proffitt v. Florida, 628 U.S. 242 (1976). Since it is a weighing and not a counting process, State v. Dixon, 283 So.2d 1 (Fla. 1973), it matters not whether there are five aggravating circumstnaces or three as long as the aggravating outweigh the mitigating. When there are no mitigating the aggravating will always outweigh, Alford v. State, 307 So.2d 433 (Fla. 1975).

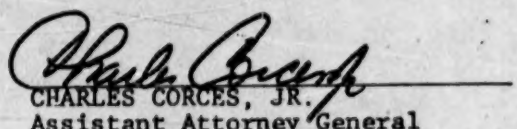
Florida's procedure has already been considered and approved by the Court in Proffitt, supra. In granting certiorari in the instant case the Court will do no more than revisit Proffitt.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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